

CHAPTER 13

**THE 1990 MAORI APPELLATE COURT DECISION
AND THE SUBSEQUENT NGAI TAHU LEGISLATION**

In this chapter, we examine the claims of Te Tau Ihu iwi relating to the 1990 Maori Appellate Court decision and the legislation which was enacted as a result of it, culminating in the Ngai Tahu Claims Settlement Act 1998. We consider the referral of the boundary issue to the Maori Appellate Court, the Crown's role at the court hearing, and whether the Crown was in breach of its Treaty obligations to Te Tau Ihu iwi when it enacted the legislation which was based on the court's findings. In carrying out this examination, we consider the court's decision, which formed the basis for the Te Tau Ihu grievance against the Crown.

The chapter opens with a narrative of these events. We then consider the issues raised by Te Tau Ihu claimants, notably Ngati Toa and Ngati Apa, who made the most detailed submissions on this question. We conclude with our assessment of whether or not the Crown breached its Treaty obligations to Te Tau Ihu iwi.

13.1 BACKGROUND TO THE ESTABLISHMENT OF THE NGAI TAHU STATUTORY TAKIWA

13.1.1 The background to the 1990 decision

In chapter 1, we briefly outlined the reason for referring the competing claims of Ngai Tahu and the Kurahaupo Waka Society to the Maori Appellate Court. In this section, we give a more detailed explanation of the background to the 1990 Maori Appellate Court decision.

The Tribunal's primary responsibility is to inquire into and make recommendations regarding allegations of Treaty breach by the Crown, not to adjudicate on disputes between iwi. In 1987–88, in order to settle the competing claims of Ngai Tahu and the Kurahaupo Waka Society, the Ngai Tahu Tribunal recommended that legislation be introduced to allow the Waitangi Tribunal to state a case to the Maori Appellate Court when tribal boundaries or customary title were at issue.¹ Amending legislation adopting this recommendation was introduced by Peter Tapsell on behalf of the Minister of Maori Affairs. Tapsell stated that:

1. Waitangi Tribunal, 'Preliminary Decision of Tribunal on Kurahaupo Waka Claim', typescript, 26 November 1987 (Wai 27 ROI, doc D9), p 6

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13.1.1

The tribunal's essential role is to adjudicate claims between Maori people and the Crown. It does not necessarily have the experience or the expertise to determine disputes between Maori people that may arise during a hearing. The Maori Land Court and the Maori Appellate Court do have that expertise and experience. Such a case-stated procedure will enable the tribunal to concentrate on its primary role while the technical and investigative matters are dealt with by the Maori Land Court.²

In 1988, the Treaty of Waitangi Act 1975 was accordingly amended with the insertion of the following section:

6A. Power of Tribunal to state case for Maori Appellate Court or Maori Land Court—

- (1) Where a question of fact,—
 - (a) Concerning Maori custom or usage; and
 - (b) Relating to the rights of ownership by Maori of any particular land or fisheries according to customary law principles of 'take' and occupation or use; and
 - (c) Calling for the determination, to the extent practicable, of Maori tribal boundaries, whether of land or fisheries—

arises in proceedings before the Tribunal, the Tribunal may refer that question to the Maori Appellate Court for decision.

The way was now open for the Ngai Tahu Tribunal to refer the boundary issue to the Maori Appellate Court for determination. The Tribunal called for submissions from the parties to the case, the Ngai Tahu Maori Trust Board and the Crown, to assist in formulating the case stated. Te Tau Ihu iwi were not parties to the case and were not involved in preparing the questions to be put to the court.

On 17 March 1989, the Tribunal asked the Maori Appellate Court to determine who held rights of ownership with respect to the land purchased by the Crown in the Kaikoura and the Arahura deeds, dated 29 March 1859 and 21 May 1860 respectively. The case stated asked:

1. Which Maori tribe or tribes according to customary law principles of 'take' and occupation or use, had rights of ownership in respect of all or any portion of the land contained in those respective Deeds at the dates of those Deeds?
2. If more than one tribe held ownership rights, what area of land was subject to those rights and what were the tribal boundaries?³

2. Peter Tapsell, 5 May 1988, NZPD, 1988, vol 488, p 4018

3. *Case Stated on a Question to Determine Maori Land and Fisheries Tribal Boundaries* unreported, 17 March 1989, McHugh MLCJ, Maori Appellate Court (Wai 27 ROI, doc Q33)

13.1.2 The 1990 Maori Appellate Court decision

The substantive proceedings came before the Maori Appellate Court at Christchurch on 18 June 1990. There were four claimant parties represented:

- ▶ Rangitane ki Wairau;
- ▶ Runanganui o te Ihu o te Waka a Maui representing Ngati Apa ki te Ra To; Ngati Kuia, Ngati Koata, Ngati Rarua, Ngati Tama, Ngati Toarangatira ki Waipounamu, Ngati Wai-kauri, Rangitane ki Wairau, and Te Atiawa;
- ▶ Ngati Toa; and
- ▶ the Ngai Tahu Maori Trust Board.

After hearing evidence from these parties over a nine-day period, the court issued its decision in favour of Ngai Tahu's exclusive rights in all the area encompassed by the two deeds.⁴

Norman Smith's influential study *Maori Land Law* was extensively quoted by counsel for Ngai Tahu and was taken by the court as its basic authority. Smith's analysis, based largely on Native Land Court writings and judgments, outlines four 'take' or rights – discovery, ancestry (take tupuna), conquest (take raupatu), and gift (take tuku). All these rights, he argues, must be supported by actual occupation to give rights akin to ownership in land. In Smith's view, as cited by the court, various principles are to be considered when weighing those rights. These include consideration of whether occupation is either complete and continuous for three generations (in the case of a claim based on ancestry or gift) or complete and absolute in the case of conquest ('it must be shown that the conquerors seized the land and reduced it into possession and retained it following, and by reason of, such conquest').⁵ Other situations might arise. In particular, purported 'owners' might be absent but have their rights kept alive by relatives; they might have occupied but been absent at 1840; or occupation may have been very recent in its origin, even though the take argued was one of ancestry.

Having outlined these principles, the court discussed its findings on the 1840 rule, which had earlier been considered in an interim decision. In August 1989, the court had found that the 1840 rule was established to prevent the continuation of inter-tribal warfare and imposed an exception to customary law by excluding take raupatu following the acquisition of sovereignty by the Crown. The rule left the rest of Maori customary law intact.⁶ Reiterating these findings in its 1990 decision, the court also commented on cases where an iwi had demonstrated one of the customary take, supported by occupation, but had been absent in 1840. The court found that 'they could revive their ahi kaa, as long as the re-occupation was peaceful and within three generations of leaving the area.'⁷

4. *Ngai Tahu Trust Board and Another v Her Majesty the Queen*, 15 November 1990, South Island Appellate Court, minute book 4, fol 672

5. *Ibid*, fol 675

6. *Ngai Tahu Trust Board and Another v Her Majesty the Queen*, 15 August 1989, South Island Appellate Court, minute book 3, fols 264–266

7. *Ngai Tahu Trust Board and Another v Her Majesty the Queen* (1990), fol 676

The court then tackled the historical questions as they affected questions of custom and title, beginning with an outline of the various deeds that the Crown had signed with different parties on the east coast. The court concluded that these deeds were ‘questionable’ evidence of ownership and that ‘clearly, Ngati Toa received favoured treatment at the hands of the Crown.’ It then described Rangitane’s claim and their evidence regarding ‘the sacred boundary’ at Waiiau-toa, before turning to Ngai Tahu’s account of the history of the area prior to 1828. The court proceeded to describe the impact of the northern invasions in the decades just prior to 1840 and outlined the questions that needed to be addressed in order for the court to come to its final decision. They were as follows:

- ▶ What was the ‘title situation’ prior to the invasion?
- ▶ What was the effect of the invasion?
- ▶ What was the situation in and around the 1840s?
- ▶ What was the situation at 1859–60, when the deeds defining the area under consideration were actually signed?⁸

The court concluded that the invasions had resulted in the conquest of the Kurahaupo tribes but that the northern tribes had failed to follow up their incursions into Ngai Tahu territory with occupation. In the court’s consideration, the question of how far south the rights of Ngati Apa and Rangitane extended was rendered largely irrelevant by those tribes’ thoroughgoing defeat. And, while the question of who held the dominant hand – Ngai Tahu or the northern iwi – was unsettled at 1840, Ngai Tahu were seen as able to fully recover their position in the 20 years after, as demonstrated by the Crown’s recognition of their rights in the Kaikoura and Arahura purchases.

With respect to the Kaikoura deed, the court found that, while Rangitane had undoubted cultural associations with sites within that area, they could not show that the tribal boundary lay at the Waiiau-toa, which Rangitane had argued was the southerly extent of their traditional association. The northern tribes had conquered the area but had failed to remain in occupation south of the Wairau. Ngai Tahu had been defeated, but their subsequent military resurgence and return to their settlement at Kaikoura meant that they had revived their ahi ka and that, according to customary law principles, they had ownership rights vested in them at the time of the signing of the deed in 1859.⁹

The court then dealt with the Arahura deed, first considering Ngati Apa’s argument that their ownership rights to land, particularly at the Kawatiri (Buller River), had been recognised at the time of sale by the inclusion of members of their iwi in payments and provision of reserves. The Maori Appellate Court rejected Ngati Apa’s case on the ground that they were post-1840 arrivals and able to occupy the land only with the permission of Ngai Tahu. Ngati Toa were deemed to have no ‘cultural tradition’ relating to the area other than

8. *Ngai Tahu Trust Board and Another v Her Majesty the Queen* (1990), fol 677

9. *Ibid*, fol 691

a leading role in the early stages of the invasion with their allies and the court found no interest on their part 'sufficient to satisfy the criteria to establish ahi kaa'. Having outlined Ngai Tahu's case – the battles fought against Ngati Wairangi, Ngati Tumatakokiri, and a large Ngati Toa taua in about 1820, as well as their history of working pounamu – the court turned to the question of the impact of the Ngati Rarua invasion. Their case, along with that of their allies, was also rejected. In the view of the court, Ngati Rarua had occupied temporarily but had withdrawn completely from the area by 1840. As on the eastern side, the deeds signed with non-Ngai Tahu for the West Coast were rejected as insignificant, an indication only of the Crown's willingness 'to deal with any Maori other than those living in the area'. In contrast, Mackay, who was the first Crown official to visit the area, after long meetings with the people then in occupation, was 'convinced that it was proper for the Crown to deal with Ngai Tahu in respect of lands as far north as Kahurangi Point'. The court thus found that, while Ngati Apa and possibly 'other northern tribe remnants' were occupying land along the Kawatiri, there was no evidence of 'a customary take to support something more than a mere right of residence'.¹⁰

In conclusion, the Maori Appellate Court found that:

The Ngai Tahu tribe according to customary law principles of 'take' and occupation or use had the sole rights of ownership in respect of the lands comprised in both the Arahura and Kaikoura Deeds of Purchase at the respective dates of those deeds.

The second question of the case stated, 'If more than one tribe held ownership rights, what area of land was subject to those rights and what were the tribal boundaries?', did not require an answer because 'Ngai Tahu only is entitled'.¹¹

13.1.3 The Ngai Tahu Report 1991 and subsequent legislation

The decision of the Maori Appellate Court set out above was binding on the Ngai Tahu Tribunal, and in its 1991 report, the Tribunal found that Ngai Tahu's grievances arising from the Crown's South Island land purchases were well founded. More specifically, in respect to the Arahura and Kaikoura purchases, the Tribunal found that the Crown had not acted honourably in its negotiations to purchase the land blocks and had not provided sufficient reserves for the existing and future needs of Ngai Tahu.¹²

Following the release of the *Ngai Tahu Report 1991*, the Tribunal issued a short supplementary report which recommended that legislation be introduced to create a tribal structure with the power to undertake a settlement with the Crown on Ngai Tahu's behalf. In

10. Ibid, fols 691–696

11. Ibid, fol 672

12. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: Brooker and Friend Ltd, 1991), vol 1, pp 115–127

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13.2

1996, the Te Runanga o Ngai Tahu Act was passed to enable the establishment of a representative tribal body to fulfil that responsibility.

The Te Runanga o Ngai Tahu Act 1996 adopted the boundaries described by the Maori Appellate Court, which in turn had adopted those of the Crown's purchase deeds with Ngai Tahu in Kaikoura (in 1859) and in Arahura (in 1860), as set out in the case stated. Under section 5 of the 1996 Act, the Ngai Tahu takiwa is defined as follows:

The Takiwa of Ngai Tahu Whanui is all the area of Te Waipounamu south of the northernmost boundaries described in the decision of the Maori Appellate Court in *Re a claim to the Waitangi Tribunal by Henare Rakiihia Tau*, 12 November 1990.¹³

Section 5 then sets out a detailed survey description of the Ngai Tahu takiwa boundaries, as illustrated in figure 1.

Following the Te Runanga o Ngai Tahu Act 1996, the Crown and Te Runanganui o Ngai Tahu entered into a deed of settlement in which the Crown acknowledged that Ngai Tahu had suffered grave injustices which had significantly impaired their economic and social development. The deed also recorded the steps required to give effect to a settlement of all Ngai Tahu's historical claims. The result was the Ngai Tahu Claims Settlement Act 1998, which also adopted the Maori Appellate Court boundaries and confirmed Ngai Tahu's authority within them. Section 6(7) of that Act states:

The Crown apologises to Ngai Tahu for its past failures to acknowledge Ngai Tahu rangatiratanga and mana over the South Island lands within its boundaries, and, in fulfilment of its Treaty obligations, the Crown recognises Ngai Tahu as the tangata whenua of, and as holding rangatiratanga within, the Takiwa of Ngai Tahu Whanui.¹⁴

Further, sections 461 and 462 state that the settlement of Ngai Tahu claims was to be final and that the Waitangi Tribunal had no jurisdiction to inquire further into or make findings or recommendations in respect of Ngai Tahu claims.¹⁵ As we noted in chapter 1, this did not prevent the Waitangi Tribunal from hearing and reporting on Te Tau Ihu iwi claims within the Ngai Tahu statutorily defined takiwa.

13.2 THE CLAIMS OF TE TAU IHU

We now turn to consider the Te Tau Ihu claims against the Crown which relate directly to the Maori Appellate Court decision and the Ngai Tahu legislation that followed. These grievances encompass the following issues:

13. Te Runanga o Ngai Tahu Act 1996, s 5

14. Ngai Tahu Claims Settlement Act 1998, s 6(7)

15. Ibid, ss 461, 462

- ▶ the Treaty of Waitangi Amendment Act 1988 and the reference of the boundary issue to the Maori Appellate Court;
- ▶ the role of the Crown in the Maori Appellate Court; and
- ▶ the Crown's treatment of Te Tau Ihu iwi rights in the course of negotiations with Ngai Tahu and in the enactment of the Ngai Tahu legislation in 1996 and 1998.

13.3 THE TREATY OF WAITANGI AMENDMENT ACT 1988

13.3.1 Te Tau Ihu submissions

We received submissions on the impact of the 1988 amendment to the Treaty of Waitangi Act 1975 from Ngati Toa and Ngati Apa. Ngati Toa argued that the hastily devised amendment had limited the Maori Appellate Court's inquiry into which Maori tribe or tribes had rights of ownership in respect of all or any portion of the land contained in the Arahura and Kaikoura deeds at the date of those deeds. Ngati Toa counsel also submitted that section 6A 'did not permit Ngati Toa or any other Te Tau Ihu iwi to participate in the formulation of the Case Stated, although their interests were to be adjudicated upon'.¹⁶

Furthermore, section 6A made no provision for appealing the appellate court's decision. In their closing submissions, Ngati Toa cited Matiu Rei's statement that 'you should have the right to appeal. That there should never be legislation constructed so that you only get to go once, and that's it.' Ngati Toa had been casualties of the legislation and the circumstances surrounding the case had been 'grossly unfair' both to them and to the other Te Tau Ihu iwi.¹⁷ They claimed that the Crown had enacted the amendment to resolve problems it was facing with the Ngai Tahu claim but that this came at the expense of Te Tau Ihu iwi.¹⁸

Ngati Apa was also critical of the Act, but on somewhat different grounds. Their counsel argued that the 1988 amendment to the Treaty of Waitangi Act breached the Treaty because it required 'European-style boundaries to be fixed by the Maori Appellate Court when such boundaries were artificial in terms of traditional Maori custom'.¹⁹ In counsel's view, the idea that deed boundaries could show tribal boundaries was particularly problematic. The line described in the Arahura deed at Kahurangi was not customary at all but was upheld by the court 'as a customary line because of inadequate evidence, and in the absence of the types of evidence and submissions now before the Tribunal'. Counsel also pointed out that the Ngati Awa Tribunal had later rejected an application to use section 6A, deeming it an inappropriate mechanism by which to determine customary rights.²⁰

16. Counsel for Ngati Toa Rangatira, closing submissions, 5 February 2004 (doc T9), p 123

17. Ibid, pp 123-124

18. Ibid, pp 126-127

19. Counsel for Ngati Apa, closing submissions, 2004 (doc T3), p 35

20. Ibid, pp 36-37

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13.3.2

13.3.2 Ngai Tahu submissions

Ngai Tahu submitted that the issues raised by Te Tau Ihu concerning the introduction of section 6A of the Treaty of Waitangi Act lay between Te Tau Ihu and the Crown. Ngai Tahu was 'not responsible for defending the actions of the Crown' with respect to introducing the amendment to the Treaty of Waitangi Act so that the Maori Appellate Court could determine the case stated. The legislation had been amended following representations from the Tribunal, and the case stated went to the Maori Appellate Court from the Tribunal as a result of the amendment. In Ngai Tahu's view, the appellate court's decision was correct.²¹

13.3.3 Crown submissions

Crown counsel submitted that, in supporting the referral of the question of customary title to the Maori Appellate Court, it had acted within the standards required by the Treaty. In fact, the Crown had been acting in compliance with the wishes of the Tribunal:

When the cross-claim issue first emerged at the start of the Wai 27 inquiry in 1987, the Crown supported the introduction of amending legislation to enable the Waitangi Tribunal to state a case to the Maori Appellate Court. The Crown did so because it was in agreement with the Tribunal's view that the Maori Appellate Court was better placed than the Tribunal to consider and determine intra Maori disputes concerning historical customary interests.²²

13.3.4 Tribunal discussion and findings

In our view, section 6A was poorly conceived but was not in breach of the Crown's Treaty obligations to Te Tau Ihu iwi.

The Tribunal's role is to inquire into and report on claims by iwi against the Crown. It may be required to investigate customary rights, but it does not inquire into and adjudicate upon disputes between iwi groups. In these circumstances, the Ngai Tahu Tribunal requested the enactment of powers to allow it to refer such matters to the forum that at the time was considered to have the appropriate experience and expertise – the Maori Appellate Court. We therefore agree with the Crown that it cannot be held in breach of its Treaty obligations by setting in place legislation intended to allow the determination of a customary question.

Nor was the exclusion of Te Tau Ihu in the formulation of the case stated a result of the legislation. This outcome was not demanded by the legislation itself but resulted from the decision of the Wai 27 (Ngai Tahu) Tribunal to call for submissions only from Ngai Tahu

21. Counsel for Ngai Tahu, closing submissions, 16 February 2004 (doc T13), pp 24–25

22. Crown counsel, closing submissions, 19 February 2004 (doc T16), pp 131–132

and the Crown in formulating the questions to the Maori Appellate Court. It chose not to include Te Tau Ihu iwi to assist in formulating those questions.

The main focus of the Wai 27 Tribunal was to inquire into alleged Treaty breaches by the Crown against Ngai Tahu. To achieve this goal, it determined that it did not require Te Tau Ihu iwi to participate in formulating the questions to the Maori Appellate Court. In terms of the Wai 27 inquiry, that may have led to the answer it was seeking in its inquiry.

In contrast, our inquiry focuses on the Crown's treatment of Te Tau Ihu iwi rights. From our perspective, the decision of the Ngai Tahu Tribunal not to involve Te Tau Ihu iwi in formulating the case stated had serious consequences for them. The result was that the questions put to the Maori Appellate Court were framed entirely in terms of the Crown's engagement with Ngai Tahu in the late 1850s, rather than in terms of who held customary rights in the area. Crown purchase deeds should not be the context to determining who held customary rights. The last two Ngai Tahu deeds and the dates on which they were signed were adopted as setting the parameters of the Maori Appellate Court's determination.

This was crucial to the way the court looked at the question of 'rights of ownership', and we consider that it placed Te Tau Ihu iwi at a disadvantage. Their customary rights became secondary to those of Ngai Tahu, and only rights of ownership at the date of the Ngai Tahu deeds were to be considered. This allowed the court to set aside other types of rights as irrelevant to the question and to ignore the possibility of a shift in right-holding as a consequence of 20 years of Crown dealing since 1840.

The Maori Appellate Court's jurisdiction was restricted to the Kaikoura and Arahura deeds in the case stated. This Tribunal can range widely over all relevant Crown purchases and set them in the context of Crown policy and its application by its land purchasing agents. As demonstrated in our earlier chapters, we see the Kaikoura and Arahura purchases as a culmination of a succession of blanket purchases, starting with the Wairau in 1847, whereby the Crown purchased the interests of one iwi after another. The Arahura and Kaikoura transactions represented the final acquisition of Ngai Tahu rights, after the rights of the northern invaders and some Kurahaupo iwi had previously been acquired over much the same territory by means of the Wairau and Waipounamu deeds. To award exclusive title to the last sellers was to ignore the interests of the first sellers – and those of the Kurahaupo iwi not recognised in the earlier purchases.

While we have found that the legislation was not in breach of the Treaty, we do consider that the legislation was poorly conceived. It represents an uneasy mix of customary and non-customary concepts. It assumes that principles of 'take' confirmed by use and occupation, as developed through the Native Land Court, are the only ones that apply. The Act identified 'rights of ownership' as the only sort of right to be determined, and it presumes that tribes consistently occupied areas encompassed within set tribal boundaries. As we have discussed in chapter 2, this has not been the view of the Tribunal in other inquiries, nor the view of most historians. The Ngati Awa Tribunal emphasised the overlapping

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nature of customary rights and viewed the concept of exclusive tribal boundaries as one that had arisen from ‘colonial influence’. In the opinion of that Tribunal, ‘the essence of Maori existence was founded not upon political boundaries, which serve to divide, but upon whakapapa or genealogical ties, which serve to unite or bind. The principle was not that of exclusivity but that of associations.’²³ Moreover, when the Ngati Awa Tribunal faced a similar issue to the one faced by the Ngai Tahu Tribunal, it rejected an application for referral to the Maori Appellate Court under section 6A. The Tribunal stated:

Section 6 may itself not be consonant with custom for it assumes that the applicable customary law principles are exclusively those of “take” and occupation or use, that the relevant rights were exclusively ‘rights of ownership’, that ‘tribal boundaries’ were a norm and that there were prescribed tribes that consistently [inhabited] the area within them.²⁴

Notwithstanding our reservations about section 6A, we confirm that the Crown was not in breach of its Treaty obligations to Te Tau Ihu iwi by introducing section 6A of the Treaty of Waitangi Act 1975, and nor was the section itself in breach. In our view, the problem lay primarily with the way the questions referred to the Maori Appellate Court were formulated and, in particular, the misleading emphasis on what was really only the final stage of a long drawn-out process of Crown extinguishment of rights in the region. The Act did not preclude the involvement of the Te Tau Ihu claimants in the formulation of the case stated, nor was there any necessary equation with boundaries set by sale deeds or any requirement that the court find only one tribal group in possession of ‘rights of ownership’.

The final issue raised by Te Tau Ihu iwi with respect to section 6A was that it did not permit an appeal against the Maori Appellate Court’s decision. This was said to be ‘grossly unfair’. On its face, if a question is referred from a Tribunal panel to the Maori Appellate Court pursuant to section 6A, there are no appeal rights and the court’s decision is binding on that panel. However, as will be discussed in the following section, there is scope for judicial review in relation to the procedural correctness of such a decision. Also, prior to the establishment of the New Zealand Supreme Court in 2003 and providing there were no statutory limitations, a prerogative right to petition the Crown for leave to appeal to the Judicial Committee of the Privy Council existed.²⁵ Therefore, notwithstanding that section 6A says that the decision of the Maori Appellate Court is binding on the Tribunal, avenues did exist to challenge that decision.

23. Waitangi Tribunal, *The Ngati Awa Raupatu Report* (Wellington: Legislation Direct, 1999), p 133

24. Waitangi Tribunal, memorandum concerning procedure, evidence, and issues in the Wai 46 (Ngati Awa raupatu) inquiry, 11 November 1994 (Wai 46 ROI, paper 2.59), p19

25. *Re the Will of Wi Matua* [1908] AC 448. We note that *De Morgan v Director-General of Social Welfare* [1997] 3 NZLR 385 (PC) distinguished the *Wi Matua* case. However, those comments are *obiter dicta* in the context of cases stated to the Maori Appellate Court.

13.4 THE ROLE OF THE CROWN IN THE MAORI APPELLATE COURT HEARING

The submissions we received from claimant counsel on the role of the Crown in the Maori Appellate Court hearing asked us to focus on two matters:

- ▶ whether the procedures adopted by the court were in breach of Treaty principles; and
- ▶ whether the Crown's role in the case breached Treaty principles.

13.4.1 Were the procedures adopted by the Maori Appellate Court in breach of Treaty principles?

We will deal briefly with the matter of whether the procedures adopted by the Maori Appellate Court were in breach of Treaty principles. Te Tau Ihu claimants made submissions on the procedural impropriety in the court. These included alleged disparities of funding between themselves and Ngai Tahu and alleged breaches of the rules of natural justice in respect to adequate notice and a reasonable opportunity to be heard. We do not detail the submissions here because these matters have already been extensively litigated in the High Court, Court of Appeal, and Privy Council.²⁶ All these courts found that the Maori Appellate Court did not breach the rules of natural justice, that Te Tau Ihu iwi did have a reasonable opportunity to be heard, and that Te Tau Ihu iwi were represented in the Maori Appellate Court proceedings.

On this issue, Ngai Tahu submitted that we cannot substitute the decisions of these courts with our 'own view on the legality or propriety of procedures followed' by the Maori Appellate Court.²⁷ We agree. This matter has been determined by the courts and will not be revisited by this Tribunal.

However, the issue of whether the Crown's role in the Maori Appellate Court hearing breached its Treaty obligations to Te Tau Ihu iwi has not been determined by the courts and falls within our jurisdiction.

13.4.2 Did the Crown's role in the Maori Appellate Court breach its Treaty obligations to Te Tau Ihu iwi?

(1) Te Tau Ihu submissions

Counsel for Ngati Toa submitted that the Crown, having given the Maori Appellate Court the power of deciding customary title on terms inherently favourable to one of the contending parties, then stood aside and did not disclose evidence that may have altered the court's view of Ngai Tahu rights as being exclusive in the region. It was submitted that:

²⁶ *Ngati Apa ki te Waipounamu Trust v Attorney-General* [2003] 1 NZLR 779; *Ngati Apa ki te Waipounamu Trust v Attorney-General* [2004] 1 NZLR 462 (CA); *Ngati Apa ki te Waipounamu Trust v Attorney-General* [2006] UKPC 49; [2007] 2 NZLR 80 (PC). The latter decision was not available at the time we concluded our hearings in 2004.

²⁷ Counsel for Ngai Tahu, closing submissions, p 25

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13.4.2(1)

The Crown was instrumental in the passage of Section 6A, and did participate in the formulation of the Case Stated. Yet it did not participate in the Maori Appellate Court case itself, despite having for the Ngai Tahu inquiry commissioned extensive relevant expert historical evidence . . . had this evidence been accessible to the Court it would have been highly influential.²⁸

Ngati Apa's counsel also argued that the Crown had deliberately withheld important evidence from the Maori Appellate Court, giving a number of instances in which documents in the possession of the Crown had not been brought to its attention. These were identified as:

- ▶ Wereta Tainui's 1849 account to Walter Mantell of 80 Ngai Tahu living in the West Coast region, south of Mawhera with 20 Ngati Apa people residing at Kawatiri;
- ▶ Wereta Tainui again recounting that position in 1878 in his petition to the Smith and Nairn Commission;
- ▶ The acknowledgement to the Native Land Court in 1921 by the Ngai Tahu rangatira Mr Te Uru of Ngati Apa rights in the Kawatiri area;
- ▶ The Native Land Court decision of 1926 when Judge Gilfedder which awarded Ngati Apa a beneficial interest in six schedule B reserves between Kawatiri and the Heaphy River totalling 179 acres.²⁹

Ngati Apa argued that the Crown possessed and knew of all this evidence and that it was the Crown's duty to all the parties – Ngai Tahu, Ngati Apa, and the court – to ensure that any evidence relevant to the customary boundary issue was made available. Ngati Apa argued that they were also unlikely to have been able to produce the archival documents in support of their claim, documents that the Crown already had in its possession. Ngati Apa maintained that, in not providing this information and in failing to take an active role in the proceedings, the Crown breached its duty of protection to Ngati Apa.³⁰ As a result of this failure to actively protect, the Maori Appellate Court largely heard 'Ngai Tahu's detailed partisan history' rather than a balanced account of customary rights.³¹

Ngati Rarua also submitted that the Crown failed to give evidence, failed to meet its obligation to inquire, and failed to ensure that Ngati Rarua were properly protected and represented.³²

28. Counsel for Ngati Toa Rangatira, closing submissions, p 123

29. Counsel for Ngati Apa, closing submissions, p 37

30. Ibid, pp 35–36

31. Ibid, pp 38–39

32. Counsel for Ngati Rarua, closing submissions, 5 February 2004 (doc T6), pp 126–127

(2) Ngai Tahu submissions

Ngai Tahu submitted that this Tribunal had received little more than the Maori Appellate Court had received in 1990. Wereta Tainui's petition was the 'only significant material relating to Ngati Apa that was presented to the Wai 785 Tribunal'. In Ngai Tahu's view, this petition did not show that 'the people of Ngati Apa descent had anything other than residence rights at Kawatiri' and it would therefore not have altered the Maori Appellate Court's decision.³³

(3) Crown submissions

The Crown maintained that there was no evidence to show that it had knowingly withheld documentary evidence from the Maori Appellate Court. Counsel argued that the Crown was not a 'keeper of the archives' and it was for the parties concerned to bring evidence to support their case, while non-archival material of a more recent nature could be accessed through the Official Information Act 1982. The Crown referred to the High Court's finding (outlined below) that the information not seen by the Maori Appellate Court was 'not of such relevant or probative value as to give rise to procedural impropriety, particularly in light of the Maori Appellate Court's reasoning in its decision.'³⁴

(4) Tribunal discussion and findings

As we have noted, the Crown did not wish to enter into disputes between iwi. As a result it did not actively participate in the Maori Appellate Court hearing, holding a 'watching brief' only and abiding the final decision of the court. In our view, this approach would have been acceptable if the Crown had no information or evidence which had the potential to assist the court. But the Crown was clearly not in that position. Not only had it assisted in formulating the questions to be answered by the Maori Appellate Court, but it also possessed evidence which was, in our view, crucial to the establishment of rights in this area.

Furthermore, as the Crown held a 'watching brief' and was involved in the proceedings, we consider that it had a positive duty to assist the court. The evidence held by the Crown was not made available to the court and therefore the Crown failed in its duty.

We note here the Crown's submission that there is no evidence that the Crown knowingly withheld documentary evidence from the court. It was shown, however, that the Crown had actively considered one of those pieces of evidence, the Wereta Tainui petition, by having it translated just prior to the court case in 1989. It may be that the failure to bring this evidence to the attention of the court was the result of an oversight, rather than a deliberate decision to not make the evidence available to the court, but in our view this does not alter the case. When considering whether the Crown has breached the Treaty, we examine

33. Counsel for Ngai Tahu, closing submissions, pp 37-38

34. Crown counsel, closing submissions, pp 133-134

its acts and omissions rather than its intentions per se (although these may exacerbate the prejudice inflicted). Whether the failure of the Crown to provide the evidence it held was done in innocence or ignorance does not excuse it of its duty to the Maori Appellate Court or of its obligations under the Treaty.

The result was that an opportunity for the Crown to balance the partisan history as presented by Ngai Tahu was lost. We thus find that the Crown failed in its duty to protect Ngati Apa and breached the principle of equal treatment. That failure is exacerbated by the Crown's awareness of the nature of its duty, and we cite here the Crown's own statement in closing submissions:

The Crown does not consider itself in the position of an orthodox defendant whose task is to 'defend' itself against claims made. In responding to the historical claims made by Maori, the Crown recognises a duty to assist the Tribunal to try and get to the truth of the matter. This includes a responsibility to test the claimant evidence and put forward alternative ways of considering the historical events at issue. It also includes a duty to put before the Tribunal relevant material of which the Crown is aware that would assist the Tribunal, whether such material affects adversely on the Crown's historical actions or not.³⁵

In an inquiry such as the one that the Maori Appellate Court was conducting, which was instigated by the Ngai Tahu Tribunal to assist it to find the truth about customary relationships between the Ngai Tahu and Te Tau Ihu claimants, we consider that the Crown had a similar duty to place all known relevant information in its possession before the court.

By failing to make this evidence available, we consider that the Crown was in breach of its duty not only to protect all parties who would be affected by the decision but also to act fairly as between Ngai Tahu and Te Tau Ihu iwi. This was a breach of the Treaty principles of active protection and equal treatment.

13.5 THE CROWN'S TREATMENT OF TE TAU IHU IWI RIGHTS IN ITS NEGOTIATIONS WITH NGAI TAHU AND IN THE ENACTMENT OF THE NGAI TAHU LEGISLATION IN 1996 AND 1998

13.5.1 Te Tau Ihu submissions

Claimant submissions on this issue focused on the Crown's failure to protect the rights and interests of Te Tau Ihu iwi when it followed the 1990 Maori Appellate Court decision and enacted the Ngai Tahu Claims Settlement Act 1998. In their view, the decision of the Maori Appellate Court was flawed. They would be prejudiced by the subsequent statutory recognition of that decision if this meant that Te Tau Ihu iwi claims would be rejected outright

35. Crown counsel, closing submissions, p 8

when they came to negotiate their own settlement with the Crown in respect to parts of the takiwa. It should be emphasised that none of the Te Tau Ihu submissions sought exclusive rights or interests south of the border, or to interfere with the Ngai Tahu settlement with the Crown. However, the claimants did seek an acknowledgement from the Crown of their independent rights and interests, and of breaches of the Treaty in certain aspects of its purchase and reserve policy within the Ngai Tahu takiwa.

Accordingly, Ngati Apa counsel argued that:

Unless this Tribunal takes a very strong stance on the nature of rights in the Kawatiri to Kahurangi Point area, then when Ngati Apa go to treat for compensation with the Treaty Settlements Division of the Crown, it will meet the answer *'The Crown is entitled to rely upon the decision of the Maori Appellate Court.'* . . . Ngati Apa have already been shown the door in 1997 by the Minister of Treaty Negotiations on one occasion and that will simply recur.

The Crown's formal response is a rejection entirely of Ngati Apa claims on the West Coast. The decision of the Maori Appellate Court gave exclusive rights to Ngai Tahu. For the Crown to say *'it is entitled to rely upon the decision of the Maori Appellate Court'* is another way of saying, yet again, that Ngai Tahu have exclusive rights to Kahurangi Point, and Ngati Apa will receive nothing by way of compensation. [Emphasis in original.]³⁶

Ngati Apa submitted that the Crown had breached its Treaty obligations to them in giving effect to the 1990 decision, in failing to accept, listen, or act on Ngati Apa's representations with respect to the injustices of the decision, and in failing to act on or heed the Tribunal's views on boundaries, as expressed in the Muriwhenua and Ngati Awa inquiries.³⁷

Also, Ngati Apa maintained that the Ngai Tahu Claims Settlement Act 1998 impinged on Ngati Apa's ability to seek redress in their claim with respect to the perpetual leases issue. In Ngati Apa's view, this demonstrated the result of the Crown's reliance on the 1990 decision. The idea of exclusive rights on the part of Ngai Tahu has become entrenched in Government policy.

Ngati Apa also argued that the Crown misled them into believing that the settlement with Ngai Tahu would not impact on any future negotiations between themselves and the Crown. This was clearly not the outcome of the binding settlement with Ngai Tahu, which *'effectively removed assets and resources from any future settlement with Ngati Apa'*. The Crown failed to adequately consult with Ngati Apa during its negotiations with Ngai Tahu. Ngati Apa stated that the Crown refused to meet, negotiate, or hear submissions from Ngati Apa, with only one exception – a 10-minute hearing at the select committee stage of considering the Ngai Tahu Settlement Bill.³⁸ The Crown's settlement with Ngai Tahu had also

36. Counsel for Ngati Apa, closing submissions, pp 42–43

37. Ibid, p 36

38. Kathleen Hemi, amendment to claim Wai 521, 9 June 1995 (claim 1.10(a)), p 9

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‘effectively removed all potential assets and resources south of Kahurangi Point that were being vested in Ngai Tahu from any recourse in the course of any subsequent Ngati Apa Waitangi Tribunal claim.’³⁹

Ngati Toa submitted that the Crown breached its Treaty obligations by relying exclusively on the 1990 decision in its statutory definition of the Ngai Tahu takiwa. Ngati Toa argued that the Maori Appellate Court specifically stated that its decision was related only to a limited question: namely, customary interests in a specific area at a specific time. The court had not intended its decision to be an authoritative guide on tribal boundaries in general. The Crown was wrong to rely on the decision to set the boundary in the Te Runanga o Ngai Tahu Act 1996 and the Ngai Tahu Settlement Act 1998. Ngati Toa argued that the Crown’s reliance on the 1990 decision breached the principle of active protection.⁴⁰

Ngati Toa also stated that the Crown failed to consult with them during negotiations with Ngai Tahu. The Crown was not apprised of the extent and nature of Ngati Toa’s interests or the effect that the settlement would have on Ngati Toa’s rights. Ngati Toa claimed that the Ngai Tahu settlement prejudicially affected them. Some of the areas vested in Ngai Tahu or subject to special statutory entitlements in favour of Ngai Tahu were areas that Ngati Toa claim as lying within their rohe.⁴¹

Ngati Rarua also pointed to the Crown’s failure to take notice of subsequent protests from Te Tau Ihu iwi. Ngati Rarua’s amended statement of claim pointed to the failure of a petition to the New Zealand House of Representatives from Te Tau Ihu iwi in 1999. The petitioners sought a Government inquiry into whether the 1990 decision was correct, given the new evidence then available; whether or not section 6A should be repealed; and what was the most appropriate procedure to follow to ensure that Te Tau Ihu iwi could proceed with their claims without further delay.⁴² Kathleen Hemi and various trusts representing Te Tau Ihu iwi interests submitted the petition in 1996.⁴³ In 1998, the petition was referred to the Justice and Law Reform Committee and was then passed on to the Maori Affairs Select Committee. On 18 February 2000, the clerk of the committee informed Mrs Hemi that the petition’s requests were ‘declined at this time’ because ‘the matters raised in the petition are before the Court of Appeal and as such, [are] *sub judice*’. Two years later, the Maori Affairs Select Committee reconsidered the petition. The committee’s report of 21 February 2002 merely stated that ‘We have no matters to bring to the attention of the house.’⁴⁴

39. Counsel for Ngati Apa, closing submissions, p 45

40. Akuhata Wineera and others, fourth amendment to claim Wai 207, 21 May 2003 (claim 1.7(d)), pp 47–48; counsel for Ngati Toa Rangitira, closing submissions, pp 122–126

41. Akuhata Wineera and others, fourth amendment to claim Wai 207, pp 47–48

42. Barry Mason and others, first amendment to claim Wai 594, 14 July 2000 (claim 1.13(a)), pp 28–29

43. The petitioners were Kathleen Hemi, the Ngati Apa ki te Waipounamu Trust, the Te Atiawa Manawhenua ki te Tau Ihu Trust, the Te Runanga o Ngati Kuia Trust, the Ngati Rarua Iwi Trust, Te Runanga o Rangitane o Wairau Incorporated, and the Ngati Tama Manawhenua ki te Tau Ihu Trust.

44. *Inquiry into the Petition of Kathleen Hemi QSM and the Ngati Apa ki te Waipounamu Trust (and Others)*, MA/02/09, Parliamentary Library, Wellington

We also received submissions from Rangitane and Te Atiawa on access to their ‘landless native reserves’, granted to them in the late nineteenth and early twentieth centuries, which lay within the Ngai Tahu takiwa. Rangitane claimed that the Ngai Tahu Claims Settlement Act 1998 prevents them from accessing their landless native reserve on Stewart Island.⁴⁵ Te Atiawa’s claim also concerned a landless native reserve: Whakapoai, on the Heaphy River, which was originally granted to Ngati Apa and Te Atiawa. The Crown allegedly breached its Treaty obligations to Te Atiawa by including the reserve in the Ngai Tahu deed of settlement.⁴⁶

13.5.2 Ngai Tahu submissions

Ngai Tahu submitted that they had no responsibility in this matter. However, they contended that the Maori Appellate Court decision was correct and thus, it was implied, the Crown could not be faulted for having relied on it in passing subsequent laws.

13.5.3 Crown submissions

The Crown argued that it was entitled to rely on the recommendations of the Tribunal and the findings of the Maori Appellate Court. Crown counsel stated:

Following the 1990 Maori Appellate Court decision, the Wai 27 Tribunal adopted the findings of the Maori Appellate Court and the findings of that Tribunal were an important consideration in the subsequent negotiation and settlement of the Ngai Tahu claims. The Maori Appellate Court finding had been incorporated into the legislation giving effect to the Ngai Tahu settlement. The Crown was entitled to rely on the decisions of a Court of competent jurisdiction.⁴⁷

Crown counsel also submitted that ‘The Crown is honour-bound to respect and uphold its settlement with Ngai Tahu.’⁴⁸

13.5.4 Tribunal discussion and findings

The Te Tau Ihu claimants contended that the Maori Appellate Court decision was flawed and that the Crown was wrong to rely on it.

45. Mervyn Sadd and others, fifth amendment to claim Wai 44, 31 January 2003 (claim 1.1(f)), pp 47, 51

46. Ngai Tahu subsequently opted for the reserve to be vested in the descendants of the original grantees, so it was not actually transferred to Ngai Tahu by the 1998 Act. As at 2004, the Crown had not investigated the ownership of the reserve: Jane Du Feu and others, third amendment to claim Wai 607, 14 February 2003 (claim 1.14(c)), p 20; counsel for Te Atiawa, closing submissions, 10 February 2004 (doc T10), pp 212–214.

47. Crown counsel, closing submissions, pp 134–135

48. Ibid, p 122

We have reached a very different conclusion from that of the Maori Appellate Court. As we pointed out earlier, our starting perspective was very different to that of the court. There, the Ngai Tahu case against the Crown provided the context for the questions posed to the court by the Tribunal. The questions set the date of Ngai Tahu sales with the Crown as the point to determine customary ownership and were instrumental to the manner in which the court considered rights of ownership. This placed Te Tau Ihu iwi at a disadvantage, as their customary rights and rights admitted by earlier Crown purchases became secondary to rights of ownership as at the dates of the Arahura and Kaikoura sale deeds with the Crown.

The parameters set for the court enabled it to arrive at its decision that Ngai Tahu had exclusive rights south of the statutorily defined boundary.

By contrast, our starting point was to consider whether Te Tau Ihu iwi also had customary rights within the Ngai Tahu takiwa. In undertaking this inquiry, it should be made very clear that this Tribunal is not an appellate body. Our role is not to consider whether the Maori Appellate Court decision was right or wrong. Our role is to examine all the evidence submitted to us by Te Tau Ihu iwi and arrive at our own conclusions based on that evidence.

In chapter 2, we set out our conclusions as to the customary rights of iwi within the Ngai Tahu takiwa. We found that, in the critical period between 1840 and 1860, Ngai Tahu did not have exclusive rights in the area in dispute.

There was intermarriage, the sharing of resources, and a fluidity of movement that existed between Ngai Tahu to the south and Te Tau Ihu to the north. On the east coast, Rangitane claimed ancestral associations with special features of the land (Tapuae-o-Uenuku, Waiautoa, and Kaparatehau) well within the territory claimed by Ngai Tahu. On the West Coast in the 1840s, an identifiable community of Ngati Apa were living within what subsequently became the Arahura block. In both cases, we considered the tangata heke to have created rights to lands formerly under the control of Rangitane and Ngai Tahu on the Kaikoura coast and Poutini Ngai Tahu and Ngati Apa on the West Coast. At 1840, none of these iwi could demonstrate exclusive rights in these lands, and the question of where any boundary lay between these iwi remained unsettled after the disruption caused by the invasion from the north. In any case, in these rugged coastal stretches, the boundary between different iwi was thought of in terms of access to, and use of, resources, not as exclusive possession of a whole area.

It is fair to say that thinking has changed on the nature of customary rights since the Maori Appellate Court decision. It has moved from a reliance on a set of hard and fast rules, formulated in the Native Land Court, to demonstrate ownership to a greater appreciation of the importance of marriages between different groups and of the ongoing nature of ancestral association, despite conquests. We are more alive to the possibility that customary

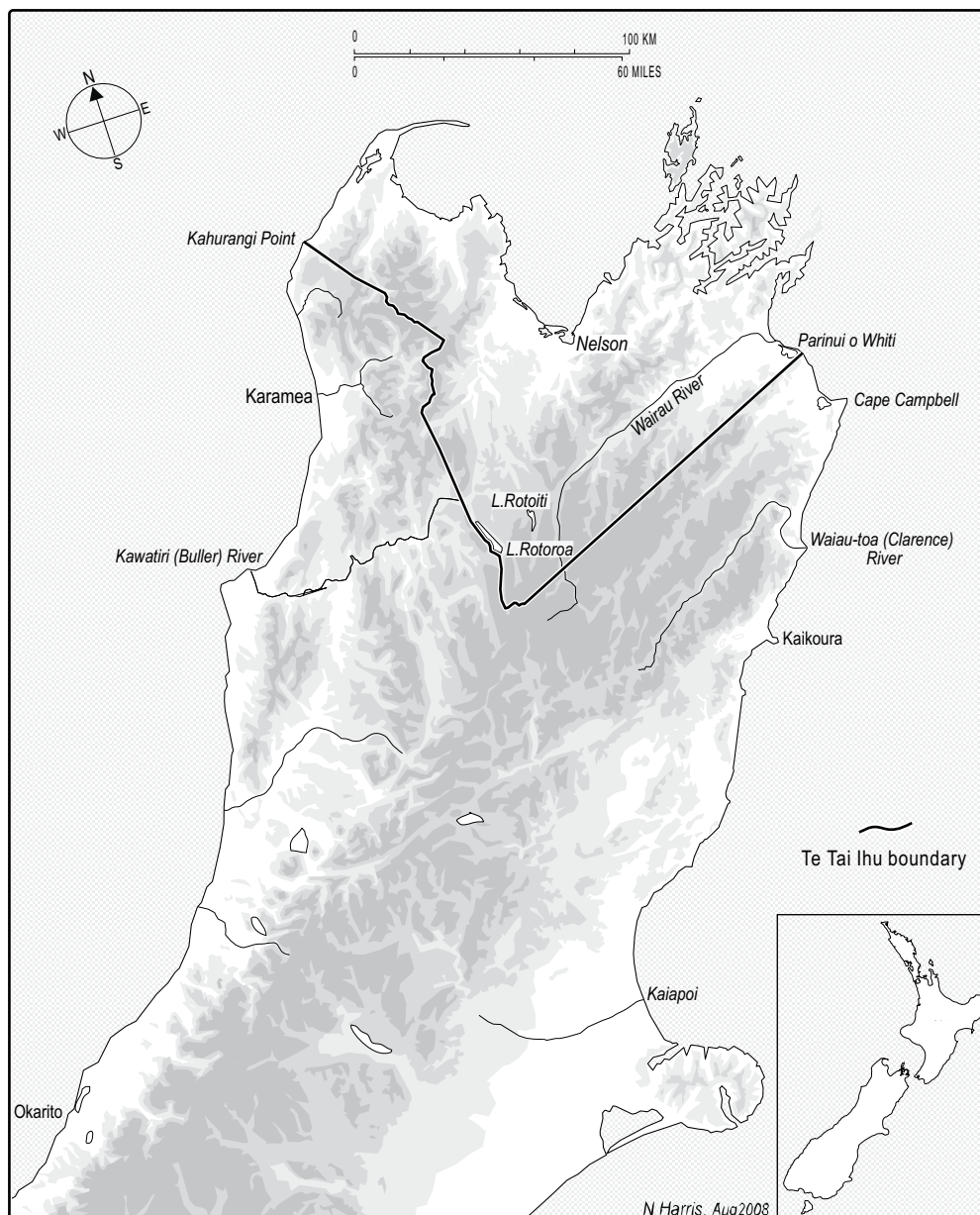


Figure 53: Ngai Tahu takiwa

society might operate on rules other than those founded solely in force or conquest and that associations with the land might be intangible as well as physical.

As has been stated previously in this report, the Waitangi Tribunal has been reluctant to fix boundaries for any one iwi. The Tribunal now thinks in terms of 'overlapping' rather than 'cross' claims, and its methodology has shifted from investigating the claim of a single tribal entity to inquiring into those of all claimant groups within a particular area of inquiry.

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13.5.4

Many Tribunal panels and historians have accepted that it was possible for more than one iwi to exercise rights in the same land, the same mountain, the same river, or the same battle site. With customary tenure, there exists an intricate system of overlapping and competing rights held by members of different kinship groups. This was particularly the case where territory was subject to disputes and migration over time.⁴⁹

As we have shown in chapter 2, this view is appropriate when considering the intricate web of whakapapa relationships between Te Tau Ihu and Ngai Tahu iwi.

In our opinion, the straight line boundary determined by the 1990 Maori Appellate Court decision was not appropriate when considering the overlapping rights of Te Tau Ihu iwi and Ngai Tahu in this area. The boundary had the effect not only of drawing a line directly through whakapapa but also of driving a wedge between some of the whakapapa relationships. Rights and interests derived from shared whakapapa cannot be extinguished or modified by drawing a straight boundary line on a map – the practical effect of the 1990 Maori Appellate Court decision (see fig 53).

We now turn to consider the legislation which followed that decision.

The courts have made it clear that neither the Te Runanga o Ngai Tahu Act 1996 nor the Ngai Tahu Claims Settlement Act 1998 prevents the Crown recognising and settling claims of other iwi. The legislation adopts the boundaries of the Maori Appellate Court's decision but not the notion of exclusivity. The Court of Appeal in the Ngati Apa case was clear on this point. Justice Keith stated:

the references to the 1990 decision in the 1996 and 1998 Acts . . . do not incorporate the notion of exclusivity over the whole of the area within the takiwa with the consequence that no claims by other tribes were still possible. To repeat, so far as the 1990 decision is concerned, the Acts make direct use only of the boundary it indicates.⁵⁰

Nor do sections 461 and 462 of the Ngai Tahu Claims Settlement Act have this effect. Justice Keith wrote:

I do not see either s 461 or s 462 as preventing in any absolute way the presentation of Ngati Apa claims to a Court or tribunal and in particular to the Waitangi Tribunal. The main purpose of s 461 is to provide for a Crown release in respect of claims made by Ngai Tahu . . . As well, in terms of s 461(3) of the Settlement Act and s 6(9) of the Treaty of Waitangi Act, the deed of settlement and the Act can not be challenged, for instance, before the tribunal.⁵¹

And Chief Justice Elias stated:

49. Angela Ballara, *Iwi: The Dynamics of Maori Tribal Organisation from 1769 to c1945* (Wellington: Victoria University Press, 1998), pp 194–200

50. *Ngati Apa ki te Waipounamu Trust v The Queen* [2000] 2 NZLR 659, 682 (CA)

51. *Ibid*, p 683

It is significant that these provisions do not preclude claims or inquiries except in respect of the 'Ngai Tahu claims'. It is those claims only which are finally settled by the Settlement Act. The s10 definition of Ngai Tahu claims is explicitly limited to claims made by any Ngai Tahu claimant. It would have been easy for the legislation to provide that no claim by any tribal group might be brought in respect of the breaches of the Treaty arising out of the tribe's use or occupation or ownership of land within the takiwa of Ngai Tahu, if that had been intended. For reasons given below, it is inconceivable that Parliament could have intended by implication to preclude a Ngati Apa claim to the Waitangi Tribunal that the Crown has breached its Treaty promises of protection of properties of Ngati Apa.⁵²

We agree that the Te Runanga o Ngai Tahu Act 1996 and the Ngai Tahu Claims Settlement Act 1998 apply only to Ngai Tahu. They do not preclude the Te Tau Ihu iwi from making claims or having their claims determined. We are of the view that the principle of non-exclusive redress, if coupled with the provision of redress to others later in good faith, is an acceptable way to settle claims in areas of overlap.⁵³ In this respect, the legislation in our view does not breach the Crown's duty of protection to Te Tau Ihu iwi.

Even non-exclusive redress has to be delivered in such a way as to not prejudice the legitimate claims of others. The next question is whether this has been the case. Has the Crown interpreted and acted on this legislation in a manner consistent with its Treaty duty to act fairly as between Te Tau Ihu iwi and Ngai Tahu? Some of the evidence presented to us suggests that the Crown has failed in this duty and has treated exclusively with Ngai Tahu within that part of the Ngai Tahu takiwa in which Te Tau Ihu iwi claim to have customary interests.

An example of the Crown dealing exclusively with Ngai Tahu can be seen in relation to the Parinui o Whiti conservation lands. In chapter 2, we found that Rangitane and Ngati Toa held customary rights in this area. By section 121 of the Ngai Tahu Claims Settlement Act 1988, the Crown has vested the sole ownership of this land in Ngai Tahu. Te Tau Ihu iwi interests in this land have been lost.

In incorrectly interpreting the legislation to give Ngai Tahu an exclusive interest in the takiwa, the Crown has limited the assets available for settlement with Te Tau Ihu iwi. Land vested in Ngai Tahu is now privately owned within the meaning of the Treaty, and it would be inappropriate – and, in any case, outside our powers – to make a recommendation to reopen that question. It should also be emphasised that none of the Te Tau Ihu claimants has sought to interfere with Ngai Tahu's settlement with the Crown.

52. Ibid, p 670

53. Waitangi Tribunal, *The Ngati Maniapoto/Ngati Tama Settlement Cross-Claims Report* (Wellington: Legislation Direct, 2001), pp 18, 22-23

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13.5.4

The opportunity to include assets in the takiwa in any future settlement with Te Tau Ihu iwi has been lost. Instead, we recommend that the Crown negotiate with Te Tau Ihu iwi to agree on equitable compensation.

There was also no consultation with Te Tau Ihu iwi during the Crown's negotiations with Ngai Tahu, with the exception of a 10-minute hearing before the select committee, notwithstanding the protests that it had received.

In our view, the Crown's fault lay in following the Maori Appellate Court decision, which created exclusivity for Ngai Tahu within its takiwa, rather than following the legislation, which did not. As a result of the Crown's actions, Te Tau Ihu iwi have lost interests in land that cannot be recovered. Moreover, the Crown's refusal to negotiate with Te Tau Ihu iwi in relation to rights within the Ngai Tahu takiwa has been prejudicial to the mana of Te Tau Ihu iwi. The loss of mana can be recovered, but it will need positive action by the Crown to educate Government departments and local authorities that the Ngai Tahu Claims Settlement Act does not give Ngai Tahu exclusive rights within their takiwa.

As demonstrated, Te Tau Ihu iwi have rights, and these rights must be acknowledged and protected by the Crown. Unfortunately, this has not been the case. The Crown by its actions has failed in its duty to act fairly as between Te Tau Ihu iwi and Ngai Tahu, notwithstanding that the Ngai Tahu legislation does not provide for exclusivity. In our view, the Crown has continued a common theme of not dealing with all iwi in an equal manner. This policy was evident in the nineteenth century and continues today.

In breaching the principle of equal treatment, harm has resulted for Te Tau Ihu iwi. This prejudice will be increased if our findings and recommendations on this issue are ignored on the ground that claims within the Ngai Tahu takiwa have been settled. They have been for Ngai Tahu, but have not yet been for Te Tau Ihu iwi.

We find that the Crown has not breached its Treaty obligations to Te Tau Ihu iwi by the passing of, or the content of, the Te Runanga o Ngai Tahu Act 1996 or the Ngai Tahu Claims Settlement Act 1998. However, in dealing with Ngai Tahu exclusively within the Ngai Tahu takiwa, the Crown has breached the principles of active protection and equal treatment, and Te Tau Ihu iwi have been prejudiced as a result. We strongly recommend that the Crown take urgent action to ensure that these breaches do not continue. If the Crown does not accept this recommendation, it will not only perpetuate the breaches set out above but will also add unnecessary and increased tension to the relationships between Ngai Tahu and Te Tau Ihu iwi.